(1) C.S. 101

SINGLE BENCH (3)

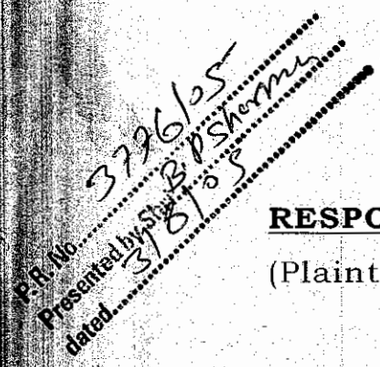
IN THE HIGH COURT OF JUDICATURE AT BILASPUR

WRIT PETITION NO. 3670 OF 2005

PETITIONER: (Defendant) — Smt. Priya Jadwani, wife of Late B.L. Jadwani, aged about 40 years, resident of Kulkarni Building, M.G. Road, Raipur.

VS

RESPONDENT: (Plaintiff) — Jagdish Ramchandra Kulkarni, son of Late Ramchandra Kulkarni, resident of Kulkarni Building, M.G. Road, Raipur.



WRIT PETITION UNDER ARTICLE ~~225~~ & 227 OF

(12)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.3670 of 2005

Smt. Priya Jadwani

- Versus -

Jagdish Ramchandra Kulkarni

POST FOR ORDER ON 7TH AUGUST, 2006

Sd/-
L.C. Bhadoo
Judge

(129)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.3670 of 2005

Smt. Priya Jadwani

- Versus -

Jagdish Ramchandra Kulkarni

Present: -

Mr. B.P. Sharma, Advocate : For the petitioner.

Mr. Sumesh Bajaj, Advocate : For the respondent.

O R D E R

(Passed on 07th August, 2006)

L.C. BHADOO, J.

1. By this petition under Article 227 of the Constitution of India the petitioner herein, who was defendant before the trial court i.e. learned 5th Civil Judge, Class-1, Raipur, has questioned the legality, propriety and correctness of the order dated 14.7.2005 (Annexure P-6) passed by learned 1st Additional District Judge, Raipur in Misc. Civil Appeal No.7/05 whereby learned Additional District Judge affirmed the order of learned 5th Civil Judge, Class-I, Raipur by which learned Civil Judge rejected the application of the petitioner herein filed under Order 9 Rule 13 of CPC, along with an application under Section 5 of the Limitation Act for condoning the delay in filing the application, for setting aside the ex-parte judgment & decree dated 13.7.2000 passed in Civil Suit No.91A/98, decreeing the suit of the plaintiff/respondent herein for damages and possession.

2. Brief facts giving rise to filing of this writ petition are that B.L. Jadwani, husband of petitioner herein was the tenant of respondent herein in the shop described in

Para-1 of the plaint. A suit for ejectment, possession, recovery of arrears of rent, damages and mesne profit was filed by the respondent herein on 20.1.1993 against Priya Electronics, through Proprietor Shri B.L. Jadwani, husband of petitioner herein. However, during the pendency of suit said B.L. Jadwani, husband of petitioner herein died, therefore, an application under Order 22 Rule 4 of CPC was filed for bringing on record the wife of Late B.L. Jadwani i.e. the petitioner herein and that application was allowed. An advocate namely Shri Deepak Diwan filed Vakalatnama on behalf of the petitioner herein in the main suit. Shri Deepak Diwan, Advocate put in his appearance on 30.1.1999 and sought time for filing the written statement. The matter was adjourned from time to time for filing of written statement till 17.4.2000, on that day Shri Deepak Diwan pleaded no instructions on behalf of the petitioner herein, therefore, learned trial court ordered for ex-parte hearing against the petitioner. After recording the ex-parte evidence the suit was decreed in favour of the respondent herein vide judgment and decree dated 13.7.2000. Thereafter, the petitioner herein moved an application under Order 9 Rule 13 of CPC on 30.1.2001 mentioning therein that she came to know about the decree only on 20.1.2001 when the warrant of possession was issued in the execution proceedings, on coming to know all this, the file of regular civil suit was inspected, on which she came to know that one Deepak Diwan, Advocate appeared on behalf of her, he pleaded no instructions on 17.4.2000, on which the trial court ordered for ex-parte proceeding. It has further been mentioned in the said application that the petitioner herein being a widow and illiterate lady, on receiving

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summons of suit contacted Shri Shri Thakur Vijay Singh, Advocate, a friend of her late husband, and informed him about the summons. She signed Vakalatnama in favour of Shri Thakur Vijay Singh, Advocate on which the name of Shri Thakur Vijay Singh was already printed. Shri Thakur Vijay Singh assured her that he will try to get the matter compromised, she need not to come to the Court and as & when her presence will be required in the court, he will inform her, but Shri Thakur Vijay Singh never gave any intimation to the petitioner till date. She was having full confidence on Shri Thakur Vijay Singh, Advocate that he will get the matter compromised. As she had faith in Shri Thakur Vijay Singh, therefore, she never contacted him. She never engaged the advocate namely Deepak Diwan to contest the suit on her behalf, she does not know who is Deepak Diwan, Advocate. The Vakalatnama signed in favour of Shri Thakur Vijay Singh has been misused, therefore, on 17.4.2000 and thereafter there was sufficient cause for the petitioner herein for not remaining present in the Court, as such, the ex-parte decree be set aside. An application under Section 5 of the Limitation Act for condonation of delay along with an affidavit was also filed. Reply of the said application was filed on behalf of the respondent herein in which it has been mentioned that the allegations of the petitioner herein that she engaged or met Shri Thakur Vijay Singh, Advocate is totally false, as Shri Thakur Vijay Singh was already counsel on behalf of the respondent herein i.e. plaintiff and infact, Shri Deepak Diwan, Advocate was engaged by the petitioner (defendant). It has also been denied that the late husband of petitioner herein was the friend of Shri Thakur Vijay Singh, Advocate, on the contrary, Shri

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Thakur Vijay Singh had already filed suits against the late husband of the petitioner herein and those suits were decreed against the late husband of the petitioner herein. Therefore, the cause shown by the petitioner herein is not reasonable and sufficient, therefore, the application is liable to be rejected. It has further been mentioned that even from January, 1991 to January, 1993 rent of the rented premises has not been paid, therefore, an amount of Rs.18,000/- is outstanding against the petitioner. The petitioner in support her application examined herself and her brother-in-law Vinod Jadwani, whereas, the respondent herein (plaintiff) examined Shri Deepak Diwan, Advocate, who was appearing on behalf of the petitioner herein in the suit.

3. Learned trial court after considering the evidence and arguments of both the parties reached to the conclusion that the petitioner herein has not been able to establish that a fraud has been practiced on her. Infact, the petitioner herein engaged the advocate namely Shri Deepak Diwan and Shri Diwan pleaded no instructions, therefore, the matter was proceeded ex-parte. The trial court further held that the petitioner herein has not been able to show any sufficient cause for condonation of delay in filing the application for setting aside the ex-parte decree and ultimately rejected the application filed by the petitioner herein against which the petitioner herein preferred a Misc. Civil Appeal, same came to be dismissed by the appellate court, as mentioned earlier.

4. I have heard Mr. B.P. Sharma, learned counsel for the petitioner as well as Mr. Sumesh Bajaj, learned counsel for the respondent.

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5. Mr. Sharma, learned counsel for the petitioner argued that from the evidence it is established that the petitioner herein or her brother-in-law were not knowing to Shri Deepak Diwan, Advocate, infact they went to the chamber of Shri Thakur Vijay Singh, Advocate, who was the friend of late husband of the petitioner herein and after obtaining signature of the petitioner herein on the Vakalatnama, Shri Thakur Vijay Singh assured the petitioner herein that he will get the matter compromised, therefore, they need not to come to the Court, as and when their presence will be required he will call them. He also argued that this fact finds support from the fact that the matter was unnecessarily dragged on for a period of about 5-6 years and thereafter, all of sudden, a Vakalatnama of Shri Deepak Diwan, Advocate was filed on behalf of the petitioner herein which shows that the fraud was practiced on the petitioner herein. He further argued that as far as no instructions pleaded by Shri Deepak Diwan, Advocate is concerned, in the first instance, said Deepak Diwan was not engaged by the petitioner herein, moreover, he had not given any notice to the petitioner herein before pleading no instructions, therefore, the courts below were not right in rejecting the application of the petitioner herein for setting aside the ex-parte judgment and decree. Learned counsel for the petitioner placed reliance on the judgments of the Hon'ble Apex Court in the matter of **Tahil Ram Issardas Sadarangani and others Vs. Ramchand Issardas Sadarangani and another** reported in **AIR 1993 SUPREME COURT 1182; Malkiat Singh and another Vs. Joginder Singh and others** reported in **AIR 1998 SUPREME COURT 258** and judgment of High Court of

M.P. in the matter of **Smt. Benibai Vs. Smt. Champabai** reported in **AIR 1996 MADHYA PRADESH 243.**

6. On the other hand, Mr. Bajaj, learned counsel for the respondent while placing reliance on the judgment of the Hon'ble Apex Court in the matter of **A.C. Ananthaswamy and others Versus Boraiah** reported in **(2004) 8 Supreme Court Cases 588** argued that in the case of fraud the petitioner is required to plead and prove the fraud, but in the present case the same has not been proved by the petitioner. He further argued that the petitioner has not been able to make out a case for exercising of power of judicial review by this Court under Article 227 of the Constitution of India.

7. Having heard learned counsel for the parties, I have perused the record as also the judgments cited by learned counsel for both the parties.

8. It is well settled law that under Article 227 of the Constitution of India the High Court can exercise or invoke jurisdiction only to correct errors of jurisdiction. As has been held by the Hon'ble Apex Court in Para-13 of the judgment rendered in the matter of **Kishore Kumar Khaitan and another Versus Praveen Kumar Singh** reported in **(2006) 3 Supreme Court Cases 312** that *"the jurisdiction under Article 227 of the Constitution may be restrictive in the sense that it is to be invoked only to correct errors of jurisdiction. But when a court asks itself a wrong question or approaches the question in an improper manner, even if it comes to a finding of fact, the said finding of fact cannot be said to be one rendered with jurisdiction and it will still be amenable to correction at the hands of the High Court under Article*

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227 of the Constitution. The failure to render the necessary findings to support its order would also be a jurisdictional error liable to correction."

9. In the matter of **Surya Dev Rai *Versus Ram Chander Rai and others*** reported in **(2003) 6 Supreme Court Cases 675** the Hon'ble Apex Court after discussing the law on the point of Article 227 of the Constitution held that "*under Article 227 supervisory jurisdiction can be exercised for keeping subordinate courts within the bounds of their jurisdiction'*. The Court further held that '*it is neither available for correcting mere errors of fact or law, available only when (i) error is manifest and apparent on face of record, and (ii) grave injustice or gross failure of justice has been occasioned thereby. The said jurisdiction can be exercised when a subordinate court assumed the jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction*".

10. Therefore, in view of the above law, it is to be seen as to whether the petitioner has been able to make out a case for interference by this Court under Article 227 of the Constitution of India.

11. The clear cut case of the petitioner, as mentioned in the application filed under Order 9 Rule 13 of CPC, is that when she received summons of the suit, she approached Shri Thakur Vijay Singh, Advocate being friend of her late husband and she signed a Vakalatnama on which the

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name of Shri Thakur Vijay Singh was already printed. Shri Thakur Vijay Singh assured her that he will try to get the matter compromised, she need not to come to the court, as and when her presence will be required in the Court, she will be called. Based on that assurance, the petitioner never came to the court. She never executed Vakalatnama in favour of Shri Deepak Diwan, Advocate, therefore, said Deepak Diwan, Advocate has misused the Vakalatnama signed in favour of Shri Thakur Vijay Singh. The petitioner examined herself and her brother-in-law namely Vinod Jadwani, who said to have been accompanied her when she went to the chamber of Shri Thakur Vijay Singh, Advocate. On the other hand, respondent herein examined said Deepak Diwan, Advocate, who appeared on behalf of the petitioner herein. Vinod Jadwani has stated that he along with her sister-in-law i.e. the petitioner herein went to the house of Shri Thakur Vijay Singh, Advocate and for getting the matter compromised they gave the case to Shri Thakur Vijay Singh. He informed them that as and when their presence will be required they will be called. He was looking after the case and he took her sister-in-law one or two times to Shri Thakur Vijay Singh. In the cross-examination he has stated that he was aware that against Priya Foam i.e. the firm of petitioner's late husband, a suit was filed by Shri Thakur Vijay Singh, Advocate on behalf of the Central Bank for recovery of amount. He was not aware that Shri Thakur Vijay Singh was the advocate on behalf of the plaintiff i.e. respondent herein. In para-5 he has further stated that on their own they went to Shri Thakur Vijay Singh and requested him to get the matter compromised. He has also stated that it is wrong to say that he was having knowledge that Shri Thakur Vijay Singh had filed the

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civil suits against his brother. In Para-6 he has stated that it is correct to say that when suit was pending they used to deposit the amount of rent with Shri Thakur Vijay Singh and in turn, he used to give receipt in the name of respondent-Jagdish Ramchandra Kulkarni. In Para-7 he has stated that Shri Thakur Vijay Singh was not the close friend of his brother, but he was residing near their house that is why they were knowing him. He has admitted that Vakalatnama (Ex.D-1) bears the signature of her sister-in-law at 'A to A' place and name of Shri Thakur Vijay Singh is not printed on the said Vakalatnama. He has stated that Vakalatnama on which her sister-in-law signed was blank, whereas, Priya Jadwani, petitioner herein has stated that on receiving the summons, she along with her brother-in-law went to Shri Thakur Vijay Singh, she signed the Vakalatnama in favour of Shri Thakur Vijay Singh, Advocate and Shri Thakur Vijay Singh asked them not to come to the court. Believing the words of Shri Thakur Vijay Singh she never approached him and when warrant of attachment came on 20.1.2001 her brother-in-law Vinod Jadwani informed her. She does not know Deepak Diwan, Advocate and she never signed Vakalatnama in favour of any other advocate. When Shri Thakur Vijay Singh started cross-examining this witness she stated that she knows Shri Thakur Vijay Singh and she can recognize him if he is brought before her. Whereas, Deepak Diwan, Advocate has stated that Vakalatanama (Ex.D-1) signed by Priya Jadwani was presented by him on the instruction of brother-in-law of Priya Jadwani, which bears his signature at 'B to B' place. At that time he stated that talks are going on for compromise of the matter. He appeared on behalf of Priya Jadwani for one year and also wrote letter to meet

him for filing of written statement, but he did not turn up, therefore, he pleaded no instructions. In the cross-examination he has stated that alongwith Vakalatnama original summons and copy of plaint was brought by brother-in-law of Priya Jadwani and after discussing the matter with him Vakalatnama was given to him. In para-5 he has stated that he sent a postcard in the month of May, 1999 to contact him for filing the written statement. He has further stated that he had not written that if they will not come, then he will not be responsible. It is incorrect to say that neither Priya Jadwani nor his brother-in-law knows him.

12. The scrutiny of above evidence shows that the petitioner herein has failed to prove and establish the fact that she along with her brother-in-law approached Shri Thakur Vijay Singh, Advocate, being friend of her late husband and signed the Vakalatnama in favour of Shri Thakur Vijay Singh, Advocate on which the name of Shri Thakur Vijay Singh was already printed. Copy of Vakalatnama (Ex.D-1) filed by Shri Deepak Diwan, Advocate, on which signature of Priya Jadwani has been appended, name of Shri Thakur Vijay Singh, Advocate is not printed, Priya Jadwani or her brother-in-law has not stated that some other Vakalatnama was signed. Since this Vakalatnama on which Priya Jadwani signed, name of Shri Thakur Vijay Singh, Advocate is not printed, therefore, the assertion made by the petitioner herein that the name of Shri Thakur Vijay Singh, Advocate was already printed on the Vakalatnama is incorrect. The claim of the petitioner that Shri Thakur Vijay Singh, Advocate was well known to her being friend of her late husband has also not been established by the petitioner.

When Shri Thakur Vijay Singh, Advocate himself was cross-examining the petitioner herein, she stated that Shri Thakur Vijay Singh, Advocate is well known to her and if he is produced before her she will be able to recognize him. This fact itself shows that Priya Jadwani was not knowing Shri Thakur Vijay Singh, Advocate, who himself was cross-examining the witness, if she was knowing him, then she could have immediately stated that Shri Thakur Vijay Singh himself is cross-examining her. The petitioner's case is that as Shri Thakur Vijay Singh was her husband's friend, therefore, they contacted him, whereas, Vinod Jadwani-brother-in-law of the petitioner herein has stated that Shri Thakur Vijay Singh was not the friend of his brother, but his house is near to their house that is why they contacted him. As has been mentioned earlier that as per the judgment of the Hon'ble Apex Court in the matter of A.C. Ananthaswamy's case where the fraud is alleged for setting aside the ex-parte decree, the party alleging practice of fraud was required not only to allege but establish the same, but in the present case the petitioner, as mentioned above, has utterly failed to establish that the fraud was practiced on her. Whereas, the evidence of Vinod Jadwani that they used to give rent of the suit premises to Shri Thakur Vijay Singh and he used to give receipt on behalf of the respondent herein also shows that the petitioner and her brother-in-law were knowing that Shri Thakur Vijay Singh was the counsel of the respondent herein. Moreover, Shri Deepak Diwan, Advocate has categorically stated that he was engaged by the brother-in-law of the petitioner herein and Vakalatnama (Ex.D-1) was given to him. He has further stated that he wrote post card in May, 1999 for contacting him for filing written

statement and when he did not turn up he pleaded no instructions. In their evidence neither the petitioner nor her brother-in-law has stated that no such postcard was received by them. In the cross-examination of Deepak Diwan, Advocate also no question was put that no letter was written to Priya Jadwani or her brother-in-law. The suit was filed in the year 1993, Deepak Diwan, Advocate appeared on behalf of the petitioner on 30.1.1999 and the suit was decreed on 13.7.2000 and for about 1½ year the petitioner did not approach Shri Thakur Vijay Singh, Advocate, this fact itself shows the negligence of the petitioner. Therefore, I am of the considered opinion that the petitioner has not been able to make out a case for exercising the power of judicial review under Article 227 of the Constitution of India, as the finding of the trial court as well as appellate court does not show any perversity.

13. As far as the judgments cited by learned counsel for the petitioner are concerned, in Malkiat Singh's case the Hon'ble Apex Court held that '*the counsel pleaded no instructions and the court did not issue any notice to the appellants, who were admittedly not present on the date when their counsel reported no instructions to the Court and the appellants only came to know about the order when they approached their counsel on 6.6.1992*'. Similarly, in the matter of Tahil Ram's case Mr. Adhia, directly sought instructions from the petitioners and made appearance before the Court. When the case reached for hearing on March 15, 1974 Mr. Adhia appeared for the petitioners and stated that he had no instructions in the matter although he had informed the petitioners regarding the date of hearing of the petition.

He requested for adjournment which was refused. Thereafter, Mr. Adhia was allowed to withdraw his appearance and since neither any counsel nor the petitioners in person were present the petition was dismissed in default. The Court held that '*when Mr. Adhia withdrew from the case, the interest of justice required, that a fresh notice for actual date of hearing should have been sent to the parties*'. The court further held that '*the party was not at fault*'. Similarly, in the matter of Smt. Benibai's case the appellant was residing at Jabalpur and the case was pending in the court of 1st Additional District Judge, Sagar. The advocate Shri Lokras appeared in the court and pleaded no instructions, then the Court held that '*it is the duty of a counsel, before pleading no instructions, to inform the party. A person who is not present in Court pre-supposes that because of engagement of a counsel his interest would be properly looked after. When, Shri Lokras had pleaded no instructions it was the duty of the Court to inquire from Shri Lokras as to why and under what circumstances he was pleading no instructions*'. The facts of above cases are distinguishable, therefore, I am of the considered opinion that the above cases are of no help to the petitioner, for the reasons that, as mentioned earlier, the petitioner's case is that she never engaged Shri Deepak Diwan, Advocate, she signed Vakalatnama in favour of Shri Thakur Vijay Singh and said Deepak Diwan has misused the Vakalatnama, which the petitioner has not been able to establish by evidence. Moreover, Shri Deepak Diwan, Advocate in his evidence has categorically stated that in the month of May, 1999 he wrote a letter to the party for contacting him in order to file the written statement, but there was no response, therefore,

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he pleaded no instructions. Apart from that the petitioner has not taken the ground in her application filed for setting aside the ex-parte decree that Shri Deepak Diwan, Advocate had not given any notice before pleading no instructions. Moreover, the evidence of brother-in-law of the petitioner herein to the extent that even during the pendency of case they were regularly paying rent to Shri Shri Thakur Vijay Singh establishes that Shri Thakur Vijay Singh was the counsel for the plaintiff/respondent herein, therefore, there was no question that Shri Thakur Vijay Singh had given consent to the petitioner to become her counsel. As such, I am of the considered opinion that the petitioner has not been able to show sufficient cause for condonation of delay and also for setting aside the ex-parte decree.

14. In the result, there is no substance in this petition, same is liable to be dismissed and it is hereby dismissed. No order as to cost.

Sd/-
L.C. Bhadoo
Judge

Roshan/-